Chugach Management Services, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 558. Case 10–CA–32024

July 30, 2004

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER AND WALSH

On July 10, 2000, Administrative Law Judge Keltner W. Locke issued a bench decision, which he corrected by an erratum issued September 14, 2000. The Respondent filed exceptions and a supporting brief. On July 1, 2002, the Board, by unpublished order remanded this case for the judge to make additional credibility determinations and factual findings necessary to the evaluation of the Respondent's argument that it would have refused to hire Anthony Jones even in the absence of his protected conduct. On September 24, 2002, the judge issued the attached supplemental decision* and order. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt his recommended Order as modified and set forth in full below.[2]

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by failing and refusing to hire Anthony Jones because of his protected activities during his employment with the Respondent's predecessor. The judge found that, under the Board's *FES* standard, the General Counsel demonstrated discriminatory motivation which the Respondent failed to rebut, and therefore that the Respondent violated Section 8(a)(1) as alleged. 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). For the reasons discussed below, we agree.

I. FACTS

Since 1987, Anthony Jones has been employed—by various contractors—as a high-voltage lineman at the Army's Redstone Arsenal near Huntsville, Alabama. When Northrop Grumman acquired the contract to maintain the electrical system at Redstone Arsenal around 1994, it retained Jones as a high-voltage lineman. Jones continued to perform such work until Northrop's contract expired in 1999.

During a significant portion of Northrop's tenure as the contractor at Redstone Arsenal, there was considerable conflict between the employees and management with respect to the issue of overtime work and its assignment. In that regard, between 1996 and 1997, Jones filed two grievances relating to the assignment of overtime work, the second of which stemmed from Northrop's suspension of Jones following his refusal to work overtime on a particular occasion. Jones was joined by another employee, Jeff Creel, in this refusal. Ultimately, in July 1997, Northrop and the Union executed a supplemental overtime agreement, which purported to resolve many of the disputed overtime issues.[3] Notwithstanding the establishment of that agreement, Jones continued to complain to others about the overtime policy.

In 1999, Respondent Chugach replaced Northrop as the contractor responsible for the maintenance of the electrical system at Redstone Arsenal. At the time it acquired the contract, the Respondent hired several of Northrop's former supervisors, including Rex Moss, who had had served as the supervisor of the high-voltage linemen. Although Northrop employed ten linemen, the Respondent decided that it could fulfill its operational needs by employing only nine linemen.[4] To determine which nine linemen should be retained, the Respondent enlisted Moss to interview the ten linemen and to make recommendations regarding their suitability for employment with the Respondent.

In conducting the interviews, Moss discussed with each of the applicants the elements of the Respondent's job description for the lineman position, including the requirement that the applicant occasionally work overtime or in inclement weather. According to Moss, when he discussed the requirements of the job description with Jones, he responded that the job description "meant nothing to him" and that he would "go by the Red Book," a

* We shall delete from the "Credibility" section of the judge's decision his inadvertent reference to the Respondent's violation of Sec. 8(a)(3) of the Act.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decisions in *Ferguson Electric Co*., 335 NLRB 142 (2001), and *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container, Inc*., 325 NLRB 17 (1997). We shall also order the Respondent to expunge from its files any reference to the illegal refusal to hire. *Central Storage and Transfer Co.*, 263 NLRB 806 (1982).

[3] As part of that agreement, Northrop rescinded the prior disciplinary action against Jones.

[4] No party has alleged that the Respondent's decision in this regard was unlawfully motivated or otherwise improper.

reference to the collective-bargaining agreement between the Union and Northrop. Following his interview with Jones, Moss prepared an unfavorable recommendation. In recommending against Jones' hire, Moss indicated that, inter alia, Jones "said he would not work overtime, callouts, or on [sic] inclement weather" and also that Jones "is very disruptive and tries to keep creating problem[s] with myself and the other linemen." Jones was the only lineman who received an unfavorable recommendation from Moss.

The Respondent subsequently hired all of the former Northrop linemen except for Jones.

II. DISCUSSION

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by failing and refusing to hire Anthony Jones because of his protected activities during his employment with Northrop Grumman. As the judge correctly found, the standard for assessing an allegedly discriminatory refusal-to-hire was established in *FES*, supra. In order to establish a discriminatory refusal-to-hire violation, the General Counsel must establish:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.[5]

FES, 331 NLRB at 12. Once the General Counsel has met his initial burden, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. Id.

We agree with the judge that the General Counsel met his initial burden. To begin with, the Respondent was clearly hiring. As the judge found, the fact that the Respondent did not have a position for all of the linemen formerly employed by Northrop Grumman is irrelevant to the liability determination here.[6]

Regarding the second requirement, *FES* requires that the General Counsel demonstrate that the applicant had *training and experience* relevant to the requirements of the position as posted by the employer. Id. at 13. We agree with the judge that Jones clearly met this standard, having already worked at the linemen position for several years. Contrary to the Respondent's argument and our colleague's dissent, Jones' limitation on his willingness to work overtime does not indicate that Jones lacked the relevant training and experience.[7]

Finally, the General Counsel established that Jones' protected conduct contributed to the Respondent's decision not to hire him. Indeed, Moss admitted as much. In effectively recommending that the Respondent not hire Jones, Moss stated that Jones "is very disruptive" and "tries to keep creating problem[s]." As Moss acknowledged in an affidavit, these statements referred to Jones' earlier refusal to work overtime (in concert with another employee) and his encouraging other employees to join the protest, as well as his later complaints.[8] As the judge found, Jones' statement at the interview reminded Moss of his previous protected activities, and Moss admittedly relied on those activities in recommending against hiring him. Accordingly, we find that the General Counsel has met his initial burden under *FES*. Id.[9]

We also find that the Respondent did not meet its *Wright Line* rebuttal burden. The reason that Moss gave for recommending against hiring Jones was essentially twofold: (1) Jones "said he would not work overtime, callouts, or on inclement weather" and (2) Jones "is very disruptive and tries to keep creating problem[s] with myself and the other linemen." The second reason refers to the overtime protests Jones organized while at Northrop. As such, it relies expressly on conduct that is both protected and concerted and by definition cannot establish a *Wright Line* defense.[10] The first reason is not true (Jones

[5] *FES* also applies to refusal-to-hire violations directed against protected concerted activity. *Bo-Ty Plus, Inc.*, 334 NLRB 523, 529 (2001).

[6] *See FES*, supra,331 NLRB 14.

[7] Of course, under *FES*, the Respondent could utilize this argument as part of its rebuttal to the General Counsel's initial cases. 331 NLRB at 14. We discuss this argument in that context, infra.

[8] Moss stated in his affidavit: "In the interview results section, I commented that Anthony [Jones] is very disruptive and tries to keep creating problems. This comment was not based on the interview, but just from working with him for the past 5–10 years. A number of employees talking to me about Anthony griping is what I was referring to. On one occasion, when Jeff Creel and Anthony refused to work overtime, they encouraged other employees to back them and their efforts and [to] refuse to work overtime. . . ."

[9] Contrary to our dissenting colleague's observation, we find that the Respondent's postviolation offer to submit the hiring decision to a group of members to be selected by the Union is of no legal significance (given the direct evidence of unlawful motivation) and was predictably unlikely to lead to a different result: it is hard to imagine that the members selected by the Union would have decided to select Jones over one of the nine already hired for the job, thereby depriving that person of a job.

[10] There is no dispute that Moss' reference to Jones' past "disruptive" activity related to the overtime protests at Northrop. Contrary to our dissenting colleague, we find that this past activity was protected concerted activity since Jones engaged in it with another employee and, in any case, with the purpose of enforcing a provision of the existing collective-bargaining agreement. *See Interboro Contractors*, 157

did *not* say he would not work overtime) and alludes, although indirectly, to the same protected concerted activity he engaged in while at Northrop. Indeed, Moss acknowledged in his affidavit that his statements referred to Jones' earlier efforts to encourage other employees to join his overtime protest. Neither of these reasons then provides a legitimate business defense.

The dissent argues that a stated requirement for the lineman position was a willingness to work overtime, and Jones was the only applicant who refused to work overtime (or placed limitations on his willingness). The flaw in the dissent is that, according to the credited testimony, Jones did *not* refuse to work overtime, callouts or in inclement weather. Rather, he said that "he would just go by the Red Book," a reference to the collective bargaining agreement that governed his employment at Northrop, including its supplemental overtime agreement, which had resolved many of the overtime protests that Jones had raised. Because the Respondent does not argue that the Red Book permitted employees to refuse to work overtime, Moss' stated reason for not hiring Jones is not correct.

Arguably, the Respondent *might* lawfully have refused to hire Jones because he placed a limitation on his willingness to work overtime (as the dissent contends), or because he insisted on working in accordance with the Northrop collective bargaining agreement, which the Respondent was not bound to adopt. The problem is that the Respondent did not assert either of those reasons. Moss stated only that Jones would not work overtime, and since that it is not correct, the defense fails. The Respondent's rebuttal burden is to demonstrate that, in the absence of Jones' protected activity, it *would* have refused to hire him for these reasons, "not merely that it might have done so or that it had a right to do so." *Mid Mountain Foods, Inc.*, 332 NLRB 251, 253 (2000), enfd. 11 Fed. Appx. 372 (4th Cir. 2001) (unpublished), citing *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998).

In short, by invoking the Red Book at his interview, Jones brought into play the overtime controversy at Northrop, and its resolution by agreement with the Union. His reference was, of course, obvious to Moss who supervised Jones at Northrop. The stated reasons for Moss' recommendation reflect that he considered Jones an agitator (at least on the overtime issue) and therefore not welcome. The fact that the Respondent was not bound to that agreement is besides the point, because the Respondent never stated that as a reason for refusing to hire him.[11]

Accordingly, we affirm the judge's finding that the Respondent discriminated against Jones because of his earlier protected activities, and find that it violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Chugach Management Services, Inc., Huntsville, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire any job applicant because of that applicant's past protected concerted activities.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Anthony Jones immediate and full instatement to the position unlawfully denied him, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Make Anthony Jones whole for all losses he suffered because of Respondent's unlawful refusal to hire him, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire, and within 3 days thereafter, notify Anthony Jones in writing that this has been done and that the refusal to hire will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967), approved in *NLRB v. City Disposal System*, 465 U.S. 822 (1984). In these circumstances, we find it unnecessary to decide whether the judge properly held that Jones' conduct *during the interview* was also protected under *Interboro*.

[11] The Respondent subsequently adopted the collective bargaining agreement with the Union.

Our dissenting colleague further argues that it could have, in any case, refused to hire Jones based on his alleged refusal to comply with a legitimate job requirement, a willingness to work overtime. As discussed above, we have found that the Respondent did not in fact rely on this, or any other, legitimate job requirement in refusing to hire Jones.

(e) Within 14 days after service by the Region, post at its facility in Huntsville, Alabama, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 30, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

I. INTRODUCTION

Contrary to my colleagues, I would dismiss the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by failing and refusing to hire Anthony Jones for the position of high-voltage lineman. In my view, the General Counsel did not meet his initial burden, because he failed to show that Jones satisfied the requirements for the lineman position, which included occasional overtime work.[1] Further, even assuming arguendo that the General Counsel met that burden, the Respondent presented sufficient evidence to demonstrate that it would not have hired Jones even in the absence of any protected activity.

II. ANALYSIS

A. General Counsel's initial burden

To establish an unlawful refusal to hire, the General Counsel must prove that (1) the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicant had experience or training relevant to the announced or generally known requirements of the position for hire; and (3) animus toward protected activity contributed to the Respondent's decision not to hire the applicant. See *FES*, 331 NLRB 9, 12 (2000). In the instant case, the General Counsel has not demonstrated that Anthony Jones satisfied the requirements of the lineman position for which the Respondent was hiring. As set forth in the majority opinion, when supervisor Rex Moss interviewed the 10 Northrop linemen, he discussed with each of them the Respondent's job description, which included a requirement of occasional overtime work. According to Moss' testimony, Jones was the only one of the 10 applicants who indicated that he would not work overtime. Specifically, when Moss asked Jones whether he would be willing to work overtime, Jones responded that the job description "meant nothing to him," and that he would "go by the Red Book," a reference to the collective-bargaining agreement between the Union and Northrop.[2] Jones' responses demonstrated that Jones did not satisfy one of the requisite qualifications for the lineman position.[3]

[12] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Whether Jones' unwillingness to work the overtime required for the position is viewed as rendering him not qualified for the position or rendering his application not one for the position being offered, the result would be the same, i.e., the Respondent did not violate the Act by failing to hire him, so I need not expressly choose between the two in this case.

[2] Whether Jones' comments constitute a complete refusal to work overtime or merely a refusal to work overtime under any circumstances that would be contrary to terms of the Union's prior contract with Northrop, as found by the judge, is immaterial. At a minimum, Jones placed conditions on his willingness to work overtime, a requirement for the lineman position. Further, it is undisputed that, at the time of the interviews, the Respondent had not adopted Northrop's collective-bargaining agreement (or executed any other agreement) with the Union. Thus, irrespective of Jones' purported belief to the contrary, the Respondent was not—by contractual agreement or otherwise—foreclosed from legitimately insisting on overtime work as a condition of employment.

[3] In my view, a necessary component of the General Counsel's burden under the second prong of the *FES* framework is a showing that the applicant met the announced requirements for the position.

Further, I do not reach the issue as to whether the General Counsel satisfied his burden of proving that the Respondent's decision not to hire Jones was motivated by animus toward protected activity. In that regard, however, I make the following observation: The Respondent offered to submit its hiring decision to a board consisting of three to five members, to be selected by the Union, or by the Union and Re-

B. Respondent's rebuttal evidence

Even assuming arguendo that the General Counsel presented sufficient evidence to satisfy his initial burden under *FES*, however, I conclude that the Respondent rebutted that showing, as the Respondent proffered evidence demonstrating that it would not have hired Jones even in the absence of his alleged protected activity. See *FES*, 331 NLRB at 12. As discussed above, a willingness to work overtime was a stated component of the job description for the lineman position. Jones was the only one of the lineman applicants who refused to work overtime (or, at a minimum, placed limitations on his willingness to work overtime). As reflected by Moss' interview notes, Jones' rejection of that specified job requirement served as the basis for the Respondent's decision not to hire him. The very first line of Moss' remarks supporting his recommendation that Jones not be hired states that "[Jones] said he would not work overtime, callouts or on [sic] inclement weather." My colleagues contend that Jones did not say that he would not work any overtime and, accordingly, the Respondent could not lawfully defend its refusal to hire Jones on that basis. My colleagues inappropriately elevate form over substance. Although Jones may not have specifically stated that he would never perform overtime work, it is undisputed that Jones is the only one of the job applicants who did not answer affirmatively when asked whether he would be willing to work overtime or in inclement weather. Further, regardless of Jones' precise remarks, as is evident from Moss' interview notes—on which the Respondent relied in making its decision not to hire Jones—Moss reasonably interpreted Jones' responses to his questions as, at a minimum, an unwillingness to work overtime in accordance with the Respondent's specifications.

In my view, it is axiomatic that an applicant's repudiation of a specified job requirement provides a legitimate basis for the Respondent's decision not to hire him for the position at issue. Indeed, even the judge in this proceeding conceded that, if the Respondent possessed the right to designate overtime work as a condition of employment, an applicant's refusal to agree to the condition could provide a legitimate justification for refusing to hire that applicant. However, as the judge found that the Respondent's reliance on Jones' refusal to work overtime in a manner inconsistent with the terms of the Union's negotiated agreement with Jones' predecessor employer was a refusal to hire based on protected concerted activity, the judge concluded that the refusal to work overtime could not constitute a legitimate basis for a denial of employment. As explained above (see fn. 1), however, the Union did not have a contractual agreement with the Respondent. Accordingly, any rights to which Jones may have been entitled by virtue of the Respondent's predecessor's agreement with the Union have no bearing on the Respondent's right to insist on compliance with its valid job requirements.[4]

III. CONCLUSION

In my judgment, since the General Counsel failed to demonstrate that Jones satisfied the Respondent's legitimate requirements for the lineman position, he failed to meet his initial burden to establish an unlawful refusal to hire. However, assuming arguendo that the General Counsel satisfied that burden, the Respondent has proffered sufficient evidence to demonstrate that it would not have hired Jones even in the absence of any protected activity. For these reasons, I respectfully dissent.

Dated, Washington, D.C. July 30, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

spondent jointly. Under the Respondent's proposal, the board would have ranked the 10 linemen following an evaluation of their respective qualifications, and the Respondent thereafter would have hired the 9 highest-ranked candidates. Thus, the Respondent demonstrated its willingness to unconditionally accept the determination of a neutral panel.

[4] Contrary to my colleagues' contention, the Respondent's failure to explicitly state that it was not bound to the Northrop-Union collective-bargaining agreement does not preclude the Respondent from refusing to hire Jones based on his refusal to comply with a legitimate job requirement, even where such refusal was premised on a perceived right emanating from that agreement.

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to hire any job applicant because of his past protected concerted activities.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by the Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, hire Anthony Jones to the high voltage electrical lineman position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Anthony Jones whole, with interest, for wages and benefits lost because of our unlawful discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to hire, and within 3 days thereafter, notify Anthony Jones in writing that this has been done and that the refusal to hire will not be used against him in any way.

CHUGACH MANAGEMENT SERVICES, INC.

John Doyle, Esq., for the General Counsel.
William K. Harvey, Esq. and *Gordon E. Jackson, Esq. (Jackson, Shields, Yeiser and Cantrell)*, for the Respondent.
Jennifer T. Dewees, Esq. (Nakamura, Quinn & Walls, LLP), for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on June 15–16, 2000, and July 5–7, 2000, in Huntsville, Alabama.[1] After the parties rested, I heard oral argument, and on July 10, 2000, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations,[2] I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[3] The Conclusions of Law, Remedy, Order, and notice provisions are set forth below.

CONCLUSIONS OF LAW

1. The Respondent, Chugach Management Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Electrical Workers, Local Union No. 338, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by refusing to hire Anthony Jones for a position as high voltage lineman.

4. The unfair labor practice described in paragraph 3, above, is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.[4]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it must be ordered to cease and desist and to take certain affirmative action, described below, designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

I recommend that Respondent be ordered to offer Anthony Jones immediate and full instatement to the position it unlawfully denied him or, if that position no longer exists, to a substantially equivalent position. I further recommend that Respondent be ordered to make Anthony Jones whole, with interest, for all losses he suffered because of Respondent's unlawful refusal to hire him.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[5]

ORDER

The Respondent, Chugach Management Services, Inc., its officers, agents, successors, and assigns, shall

[1] Respondent's posthearing motion to receive R. Exh. 36 into evidence is hereby granted, and R. Exh. 36 is received.

[2] Section 102.45 of the Board's Rules provides, in part, that "If the administrative law judge delivers a bench decision, *promptly upon receiving the transcript* the judge shall certify the accuracy of the pages of the transcript containing the decision . . . ." (Emphasis added.)

Typically, the administrative law judge will receive the transcript of a bench decision within 2 to 3 weeks. When the transcript in this case did not arrive within that time period, the Division of Judges staff made inquiries to locate and obtain it. My office received the transcript on August 23, 2000.

[3] The bench decision appears in uncorrected form at pp. 1022 through 1044 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as App. A to this certification.

[4] I have found that although Respondent's refusal to hire Anthony Jones violated Sec. 8(a)(1) of the Act, by interfering with, restraining and coercing employees in the exercise of Section 7 rights, the evidence was insufficient to establish that this action discriminated against Jones to discourage membership in a labor organization, within the meaning of Section 8(a)(3) of the Act. The Respondent had recognized the Union voluntarily and there is no evidence that Respondent intended to discourage membership in it. Instead, Respondent sought to avoid hiring an employee who had demonstrated an inclination to assert rights under the collective-bargaining agreement.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Refusing to hire any job applicant because of that applicant's assertion of a right under a collective-bargaining agreement, or to interfere with, restrain, or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Offer Anthony Jones immediate and full instatement to the position unlawfully denied him or, if that position no longer exists, to a substantially equivalent position.

(b) Make Anthony Jones whole, with interest, for all losses he suffered because of Respondent's unlawful refusal to hire him.[6]

(c) Preserve and, within 14 days of request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its place of business in Huntsville, Alabama, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 13, 2000

APPENDIX A

JUDGE LOCKE: This is a bench decision in the case of Chugach Services, Inc., which I will call the "Respondent," and International Brotherhood of Electrical Workers, Local Union No. 558, which I will call the "Charging Party" or the "Union." The case number is 10–CA–32024. This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

The Complaint in this matter alleges that Respondent failed and refused to hire Anthony Jones in violation of Sections 8(a)(1), and (3) of the National Labor Relations Act. For reasons I will discuss, I find that Respondent's refusal to hire Jones violated Section 8(a)(1) of the Act. However I find the evidence insufficient to establish a violation of Section 8(a)(3).

I will begin with a procedural history. The Union filed the charge in this proceeding on October 20, 1999. After an investigation, the Regional Director of Region 10 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the Complaint, on February 25, 2000.

In issuing the Complaint, the Regional Director acted on behalf of the General Counsel of the National Labor Relations Board, whom I will refer to as the General Counsel or the Government.

In its answer to this Complaint, and orally at hearing, the Respondent has admitted certain allegations. Based upon those admissions, and the record as a whole, I find that the General Counsel has proven the allegations in Complaint Paragraphs 1, 2, 3, 4, 5, and 6. With respect to Complaint Paragraph 5, I find that the name of the individuals in subparagraph (d) is Bill Tunstill, rather than Bill Hostell.

More specifically, based upon Respondent's admissions at hearing, I find that during the period August 1, 1999, to September 30, 1999, Bill Scillian, Ray Stephenson, Rex Moss, and Bill Tunstill were Respondent's agents for the purpose of selecting Respondent's work force. Additionally, during this period, Mr. Scillian was Respondent's agent for the purpose of entering into collective-bargaining agreement with unions representing the workforce. Further, I find that since October 1, 1999, these individuals have been both supervisors and agents of Respondent.

Respondent has a contract with the United States Army to maintain the electrical system at the Army's Redstone Arsenal near Huntsville, Alabama. It began performing services under this contract on October 1, 1999. Before that time, another contractor, Northrop Grumman, performed these services. I will refer to Northrop Grumman simply as "Northrop."

When Respondent replaced Northrop Grumman as contractor, it hired some of Northrop's supervisors, including Rex Moss, who supervised the high voltage linemen. Respondent assigned to Moss the task of interviewing these linemen and determining which ones he would recommend for hire.

Although Northrop employed ten high voltage linemen, Chugach determined that it only needed to fill nine such positions. Therefore, at least one of the Northrop linemen would not be hired.

Moss gave one of the linemen, Anthony Jones, an unfavorable recommendation. Although Respondent hired the other eight high voltage linemen, it did not hire Jones. The government alleges that Respondent discriminated against Jones because he asserted rights under a collective-bargaining agreement, which Northrop had negotiated with the Union.

Chugach denies that Jones had engaged in any activity protected by the Act. Additionally, Respondent denies that it had an unlawful motive and points to several facts which, it asserts, demonstrate a lack of animus against the Union. Notably, Respondent recognized the Union as the exclusive collective bargaining representative of the linemen, and signed a contract with the Union identical to that previously signed by Northrop.

[6] Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

In determining whether Respondent's refusal to hire Jones was unlawful, it is helpful to begin by reviewing Jones' employment history. Beginning in 1986, Jones worked for contractors performing services at the Redstone Arsenal. The first contractor which employed Jones was Holmes and Narver. In 1987, while working for this contractor, Jones became a high voltage lineman.

When Northrop obtained the contract to perform the same services, it hired Jones as a high voltage lineman, and he continued to perform this work until the end of Northrop's contract in September 1999. During much of the time Jones worked for Northrop the assignment of overtime caused conflicts between the employees and management.

In 1996, Jones filed a grievance regarding allocation of overtime. This grievance invoked Section 10.8 of the Union's collective-bargaining agreement with Northrop, which stated, in part, as follows:

> Before requiring employees to work overtime, the company will request volunteers from among the employees in the section in which overtime will be worked. Overtime will be allocated as equally as possible among such employees . . . .

At step 4 of the grievance procedure, the Union sent an April 8, 1996 letter to Northrop's program manager, stating in part, "the Union feels the allocation process has not been used as equally 'as possible', therefore, according to Article VII, Section 7.2(d), the Union does hereby appeal. This contractual procedure authorized a grievance committee consisting of union and company representatives to resolve the matter.

However, issues related to overtime continued to cause friction. One aspect of the overtime policy related to employees not actually on duty, but on "standby" status. Northrop took the position that the first two employees in line for mandatory overtime were on such standby status, and had to inform the company where they could be reached during non-duty hours.

On May 2, 1997, Northrop's control room operator contacted Jones while Jones was off duty, and advised him to report for work to respond to a power outage. Jones replied, in effect, that he had been drinking and was not able to perform high voltage work safely. Northrop considered Jones to have violated a company rule and suspended him for three days.

Jones filed a grievance resulting in negotiations between the Union and Northrop. In July 1997, the parties reached an agreement which rescinded the suspension, and, more generally, established an overtime policy which both sides considered an improvement.

When Respondent replaced Northrop as contractor, it continued this overtime agreement. However, the Union and Respondent do disagree to some extent on how this agreement should be interpreted. The Union maintains that the agreement does not provide for mandatory overtime. The Respondent counters that although the agreement does not contain the word mandatory, it does allow Respondent to require an employee to work overtime under certain circumstances.

Before Respondent replaced Northrop as contractor, Jones applied for a position as a high voltage lineman. Rex Moss, who supervised Jones conducted the job interview. In accordance with the Respondent's admission, I find that in conducting this interview, and in making his recommendations regarding employees to be hired, Moss was acting as Respondent's agent.

During the interview, Moss discussed the elements of the job description for high voltage lineman. The job description lists a number of special requirements, including the following, "May occasionally be required to work overtime and in inclement weather."

According to Moss, several times during the interview, Jones said that he did not go by the job description, but by the "red book," meaning the collective-bargaining agreement. Jones gave similar, but not quite identical testimony, stating that when Moss referred to the job description, Jones replied, "Well, I just go by the bargaining agreement."

After interviewing Jones, supervisor Moss wrote an unfavorable recommendation. It stated as follows:

> When interviewed, Anthony said he would not work overtime, callouts, or on inclement weather. Anthony was very uncooperative, and did not want to answer any questions.
>
> Anthony is very disruptive and tries to keep creating problems with myself and the other linemen.
>
> I recommend that Anthony not be rehired, and replaced with another lineman. Anthony does not put forth any effort to help the company, or anyone else to make this job easier for everyone. Anthony seems totally unsatisfied with his job and with company."

Respondent did not offer Jones employment. The government asserts that by failing to offer Jones employment, Respondent interfered with, restrained, and coerced employees in exercise of rights guaranteed in Section 7 of the National Labor Relations Act and thereby violated Section 8(a)(1) of the Act. The Complaint also alleges that this action constitutes discrimination against Jones in violation of Section 8(a)(3) of the Act.

It is helpful to review the legal standards for determining when an employer's refusal to hire a job applicant violates the Act. The Board recently summarized these standards in *FES*, 331 NLRB No. 20 [9] (May 11, 2000). To establish a discriminatory refusal to hire, the General Counsel must prove the following elements:

> First that the Respondent was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct;
>
> Second that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and
>
> Third, that antiunion animus contributed to the decision not to hire the applicants.

Once the General Counsel has established these elements, the burden will shift to the Respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the Respondent asserts that the applicants were not qualified for the positions it was filling, it is the Respondent's burden to show at the hearing on the merits that

they did not possess the specific qualifications that the position required, or that others (who were hired) had superior qualifications and that it would not have hired them for that reason even in the absence of their union support or activity.

I find that the evidence clearly establishes the first element. It is undisputed that Respondent was planning to hire employees at the time Moss interviewed Jones. In fact, Respondent did hire nine high voltage linemen.

Second, I find that the General Counsel has proven that Jones met the requirements for the position of high voltage linemen. The job description included the requirement of four years' experience as a journeyman high voltage lineman, and Jones had about twelve years experience in that position.

The government must also establish that antiunion animus contributed to the decision not to hire Jones. Both Jones and Moss testified that during the job interview, Jones said that he would go by the collective-bargaining agreement. Moss's testimony, which I credit, indicates that Jones made this comment several times, in the context of a discussion of the job description. Thus, I conclude that Jones was communicating that the negotiated agreement, rather than the job description, controlled the assignment of overtime.

Jones' statement carried considerable emotional freight, considering the history which he and Moss shared. Moss had been Jones's supervisor when Jones filed the two grievances concerning overtime issues. These grievances implicitly challenged management's authority to define, unilaterally, when it could require a lineman to work at other than regularly scheduled times.

When Moss gave Jones an unfavorable recommendation, he did not write that Jones stated that he would go by the collective-bargaining agreement rather than by the job description. Rather, Moss wrote in the recommendation that Jones "said he would not work overtime." This statement either mischaracterizes or ignores the essence of what Jones told Moss, namely that he would follow the negotiated contract. However, when Moss wrote this recommendation, he was acting as Respondent's agent, and his knowledge of what Jones communicated must be attributed to the higher management officials who acted upon Moss's recommendation.

I find that when Moss recommended that Jones not be hired, he was motivated, at least in part, by Jones' assertion that he would follow the collective-bargaining agreement rather than the job description. Moss had supervised Jones in 1986 and 1987, when Jones filed grievances regarding overtime policy, and Moss certainly knew about the conflict accompanying these grievances.

Respondent asserts that the agreement negotiated by Northrop and the Union in 1987 laid to rest the conflicts concerning overtime. Under this reasoning, Moss would not be afraid that Jones would raise similar disputes if hired by Respondent.

In this regard Moss testified that after Northrop and the Union reached agreement on overtime, he held a party to celebrate. However, the conflict regarding overtime still had at least a little life left. Thus, even at hearing, the Respondent and the Union did not agree on whether overtime ever was mandatory.

Moreover, even if Union and Northrop had totally resolved the overtime issue through their 1997 agreement, Jones' insistence that he would go by the "red book" could suggest that he would raise conflicts with respect to other contractual matters. Specifically, the term "red book" does not refer to the 1997 overtime agreement, but to the more general collective-bargaining agreement between the Union and Northrop. This contract, in evidence as Joint Exhibit 1, has a red cover.

Jones' statement that he would follow the "red book" could easily suggest that he would be raising other contractual issues if Respondent hired him. Indeed, in his recommendation not to hire Jones, Moss wrote, "Anthony is very disruptive, and tries to keep creating problems with myself and the other linemen." This statement is fully consistent with the fear that Jones would continue to insist upon rights under the contract.

The General Counsel contends that when Jones expressed an intent to rely upon the collective-bargaining agreement, that statement constituted protected activity. See *Interboro Contractors*, 157 NLRB 1295 (1966), and *NLRB v. City Disposal Systems, Inc.*, 465 US 822 (1984). See also *Union Carbide Corp.*, 331 NLRB No. 54 [356] (June 21, 2000).

Respondent however, asserts that when Jones made the statement about following the "red book," he was claiming that overtime was not mandatory under any circumstances, an issue which he reasonably and honestly could not raise in view of the 1997 agreement which the Union and Northrop had reached on this issue, an agreement which Respondent had adopted. Therefore, Respondent argues, this statement was not protected by the [A]ct.

Respondent's argument is not persuasive. As noted in *Frances Building Cooperative*, 327 NLRB No. 89 [485] (January 29, 1998), an employee does not have to be correct in his assertion that a provision of the collective-bargaining agreement has been violated. The Act protects an employee's right to protest a contractual violation so long as his complaint or action is based on a reasonable and honest belief that his contractual rights have been violated, and so long as this action is reasonably directed toward enforcement of a collectively bargained right.

Even at the hearing in this matter, some three years after the Union and Northrop reached the overtime agreement, the parties spent considerable time eliciting testimony on whether overtime could ever be mandatory. Respondent, in effect, contends that this dispute is merely a matter of semantics, and that it could require overtime even though the Union was unwilling to use the word "mandatory" in its agreement. Of course, the lawyers in this proceeding were very reasonable and honest individuals, and if they cannot agree on whether the contract provides for mandatory overtime, it would certainly not be unreasonable or dishonest for an employee to raise a similar issue. Therefore, I conclude that raising a contractual issue about mandatory overtime would not, even now, exclude an employee from the protection of the *Interboro* doctrine.

Moreover, Jones' statement, which I find to be protected, was that the would go by the "red book," that is, by the collective-bargaining agreement rather than by the job description. This statement is not limited to issues about overtime. The "red book" addresses many other topics. The law certainly protects

an employee's statement to the effect that the negotiated collective-bargaining agreement prevails over a unilaterally-drafted job description. Discriminating against an employee because of fear that the employee will assert any right under the collective-bargaining agreement is unlawful.

In oral argument, Respondent suggested that the Act did not protect Jones' statement because evidence did not establish that Jones was asserting anyone's right but his own. However, the evidence clearly establishes that when Jones filed his grievance concerning overtime, the Union pursued this grievance vigorously on behalf of all the linemen in the bargaining unit. Respondent had no reason to believe that if Jones asserted another right under the contract, the Union would be any less diligent.

In sum, I conclude that the General Counsel has established the third element under the framework described in *FES*. Therefore, I find that the burden shifts to the Respondent to establish that it would not have hired Jones in any event.

About ten years ago, when both Jones and Moss were working as linemen for the contractor then providing services to the Redstone Arsenal, they had an altercation in which Jones called Moss a name, and Moss hit Jones. If the evidence established that a lingering grudge would have prevented Moss from hiring Jones under any circumstances, I would find that the decision not to hire Jones did not violate the Act. In other words, I do not sit in judgment regarding whether the decision met some particular standard of fairness, or whether I would have made the same decision. Rather, I only decide whether the officials who did make the decision would have reached the same result in the absence of any unlawful motivation.

However, the evidence does not establish that Moss carried a grudge against Jones. Moss's pretrial affidavit, in evidence as General Counsel's Exhibit 29, states, "Anthony and I had a scuffle around 1990, but it had nothing to do with him not being rehired." No evidence contradicts this assertion, and I find it to be true.

At hearing, the Respondent elicited testimony from a number of his linemen concerning their reluctance to work with Jones. They painted a picture of Jones being unwilling to wear his safety apparel, and less than attentive to his duties.

Their testimony may be relevant in two ways. If Moss relied upon the opinions of these linemen in making his recommendation, then these opinions may constitute a lawful reason for deciding not to hire Jones. In that event, I must determine whether Moss would have made the same recommendation, not to hire Jones, based on these opinions, and even if Jones had not engaged in protected activity.

Additionally, the testimony of these linemen may be relevant to the extent it corroborates the opinion which Moss reached while supervising Jones' work. For example, Moss testified before Northrop got the contract to perform services at the Redstone Arsenal, both he and Jones had worked as linemen for the previous contractor. When Northrop took over, it made Moss a supervisor, and asked him to perform a role similar to that he later performed for Chugach, namely, making recommendations as to which of the previous contractor's linemen should be hired.

Moss testified that he recommended Northrop not hire Jones because of problems with Jones' work. However, at the last minute, Northrop's higher management overruled this decision and hired Jones anyway. Respondent argues that since Moss did not recommend Jones for employment at this time, when Jones had not engaged in protected activity, Moss would have made the same decision for Chugach in 1999, regardless of Jones protected activity.

This argument has considerable force. However, in evaluating it, I must determine as nearly as possible what Moss took into account when he evaluated Jones for possible employment by the Respondent.

The General Counsel contends that Moss's pretrial affidavit gives a more accurate picture of this decision making thought process than does his testimony at hearing. Specifically, the General Counsel argues that by the hearing date, Moss had more time to come up with additional reasons for failing to hire Jones, reasons that had not entered Moss's mind at the time of the decision.

The General Counsel introduced Moss's affidavit into evidence. Board decisions allow me to consider statements in this document for the truth of the matters they assert, even though the affiant made the statements outside the courtroom, and at a time he was not subject to cross-examination. See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978); *St. John Trucking*, 303 NLRB 723 (1991).

Additionally, in this case, Moss's pretrial affidavit does not constitute hearsay because he is an agent and supervisor of Respondent. The statements he made in that capacity constitute admissions of a party opponent within the meaning of Rule 801(d)(2) of the Federal Rules of Evidence.

Moss's pretrial affidavit does not indicate that he failed to recommend Jones for employment because of problems with Jones' work. Moss's affidavit recounts that he had been Jones' supervisor for 5 years and states, "I had never had any problems with his work, except for sometimes he was careless. There were some linemen that he did not want to work with. The only ones he wanted to work with were Tommy Wooldridge and James Lane. I knew this because Anthony had requested to work with those two as much as possible. There was not anyone who requested not to work with Anthony."

The statement that "there was not anyone who requested not to work with Anthony," is straightforward, and there is no reason to believe that it resulted in miscommunication between the affiant and the Board agent. Because Moss had been called upon to explain his recommendation not to hire Jones, it would appear likely that he would have mentioned in his affidavit any instances in which another lineman had refused to work with Jones.

Based on this statement in the affidavit, I cannot conclude that Moss relied on the opinions of Jones' fellow linemen in recommending that Respondent not hire him. However, Moss did report in his affidavit that Moss was sometimes careless, and there is certainly reason to believe that Moss held this opinion in good faith. The four other linemen who testified at the hearing expressed similar opinions.

In his affidavit, Moss also explained the reasons he gave in his written recommendation not to hire Jones. Examining his explanation will help determine the extent to which Jones'

work problems and carelessness affected Moss's recommendation. Moss's affidavit states, in part, as follows:

> During the interview, I specifically asked Anthony if he would be willing (in reference to Job Description 5d) to work overtime and in inclement weather. Anthony said NO. It meant nothing to him, that he would go by the Red Book. From those comments from Anthony, I based the first comment of my interviewer comments.
>
> I continued to ask him questions, and he would only say that it didn't matter to him, that he would just go by the Red Book. No other employees referred to the Red Book. The basis of my second statement that Anthony was very uncooperative, and didn't want to answer my questions, was by his answering that he just wanted to go by the Red Book on a number of occasions.
>
> In the interview result section, I commented that Anthony is very disruptive and tries to keep creating problems. This comment was not based on the interview, but just from working with him for the past 5–10 years. A number of employees talking to me about Anthony griping is what I was referring to. On one occasion, when Jeff Creel and Anthony refused to work overtime, they encouraged other employees to back them and their efforts and refuse to work overtime. A number of employees, specifically Ralph Bates and Bobby Miller, Steve Pearson and maybe others that I can't recall, came to me to tell me what Jeff and Anthony were saying and that they did not support Anthony and Jeff in refusing to work overtime. It was Anthony and Jeff's refusal to work overtime that led to their discipline and then led to the grievance that led to the July 24, 1997 agreement.
>
> Anthony kept picking on this mentioned agreement about overtime. He came to me and he went to others and complained. To the best of my recollection, after the agreement had been signed, both Bobby and Ralph had come to me because Anthony had been telling them it needed to be changed, (the agreement). About a year after the agreement was reached, when these complaints were said Anthony never again refused overtime.

In the last sentence quoted, the word "said" appears to be a typographical error. It appears more likely that the intended word was "settled."

At the bottom of this page of the affidavit appears an additional sentence, "These were the only times the employees came to me, aggravated with Anthony's complaints of the overtime policy." There is an arrow pointing towards this sentence, with Moss's initials beside the arrow.

Later, in the affidavit, Moss noted that other employees had complained to him about hours, tools, and equipment, but that Jones had not complained about anything but overtime and with whom he worked it.

It is important to determine whether Moss recommended against hiring Jones because he believed Jones would refuse to work overtime, which would be a lawful reason for not hiring him, or because he believed Jones would assert rights under the collective-bargaining agreement, which is unlawful. According to Moss's affidavit, Jones said NO, meaning that he would not work overtime.

However, it is difficult to take that statement at face value. Elsewhere in the affidavit, Moss indicated that after Jones' overtime complaints were settled, he did not again refuse to work overtime.

Moreover, Moss's affidavit explained that Jones kept referring to the "red book," meaning the collective-bargaining agreement, and that no other applicant referred to the "red book." Thus Moss certainly took into account that Jones was aware of his contractual rights, and might assert them as he had done previously.

Additionally, Moss wrote on his unfavorable recommendation that Jones was disruptive and tried to create problems. Explaining the word "disruptive" in his affidavit, Moss reported that Jones had encouraged other employees to refuse to work overtime. Thus, Moss was referring to Jones' exhorting other employees to engage in concerted activity and/or to assert a contractual right.

Clearly, in explaining why he gave Jones an unfavorable recommendation, Moss focused on Jones' references to the collective-bargaining agreement, and to the times Jones urged other employees to side with him on the overtime issue.

Most telling, I believe, is the comment in Moss's affidavit that Moss had received information from other employees that Jones believed that the 1997 overtime agreement needed to be changed. Based upon this information, Moss had reason to conclude that if Respondent hired Jones, Jones would seek to reopen an issue that Moss believed had been put to rest.

Indeed, from his own testimony, it is clear that when the Union and Northrop reached agreement on the overtime issue in 1997, Moss was so happy that he paid for a party out of his own money. Needless to say, Moss would not have wished to hire an employee whom he believed wanted to undo this agreement he considered beneficial, and have the Union negotiate a new one.

In sum, Moss's affidavit suggests that when he recommended against hiring Jones, his reasoning focused to a large extent on the position Jones had taken on the overtime issue, clearly an issue of contract interpretation, which the Union and Northrop ultimately resolved. Similarly, Moss focused on what he called "Anthony griping" about the overtime issue. Except in unusual circumstances not present here, an employee griping to other employees about a term or condition of employment is engaged in activity protected by the Act.

The issue I must decide is a narrow one, namely, would [S]upervisor Moss have made the same recommendation if Jones had engaged in no protected activities. Respondent bears the burden of proof on this issue, but I find that Respondent has not carried its burden.

As Moss's affidavit makes clear, thoughts about Jones' protected activity permeated his decision-making process. I cannot conclude that he would have made the same recommendation if Jones had engaged in no protected activities, even though Jones' work as an employee had been less than perfect.

Therefore, I find that by refusing to hire Anthony Jones, the Respondent interfered with, restrained, and coerced employees in the exercise of Section 7 right[s], in violation of Section

8(a)(1) of the Act. The Complaint also alleges that this action violated Section 8(a)(3) of the Act. However, I do not find the evidence sufficient to establish a violation of 8(a)(3).

When I receive the transcript of this proceeding, I will prepare a certification of Bench decision to which I will attach the portion of the transcript supporting this decision.

This certification will also include provisions relating to remedy order and notice. When that document is served on the parties, the time for filing the appeal if any, will begin to run.

Thank you for your cooperation in this matter, the hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the National Labor Relations Act gives employees the following rights:

> To form, join, or assist labor organizations;
> To bargain collectively through representatives of their own choosing;
> To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;
> To refrain from any or all such activities.

WE WILL NOT refuse to hire any job applicant because that job applicant might assert a right under our collective-bargaining agreement with the Union, or otherwise to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Anthony Jones immediate and full instatement to the position we unlawfully denied him or, if that position is no longer available, to a substantially equivalent position.

CHUGACH MANAGEMENT SERVICES, INC.

John Doyle, Esq., for the General Counsel
William K. Harvey, Esq., Gordon E. Jackson, Esq. and Valerie Barnes Speakman, Esq. (Jackson, Shields and Yeiser), of Memphis, Tennessee, for the Respondent
Jennifer T. Dewees, Esq. (Nakamura, Quinn & Walls, LLP), of Birmingham, Alabama, for the Charging Party

SUPPLEMENTAL DECISION

KELTNER W. LOCKE, Administrative Law Judge: On July 10, 2000, I issued a bench decision in this matter. Following the certification of that bench decision, Respondent filed timely exceptions. On July 1, 2002, the Board issued a Decision and Order Remanding Proceeding, which directed as follows:

> The judge should make additional credibility determinations and factual findings as are necessary to evaluate the Respondent's argument, as set forth in its brief, that it would have refused to hire Anthony Jones even in the absence of his protected conduct.

On July 9, 2002, Respondent filed a "Motion for Briefing Schedule Pursuant to the Board's Decision and Order Remanding Proceeding." By order dated July 24, 2002, I set August 16, 2002 as the deadline for filing briefs. Both the Respondent and General Counsel have filed timely briefs, which I have considered.

Background

The United States Army operates the Redstone Arsenal at Huntsville, Alabama. It contracts with a private company to maintain the base's electrical system and, from time to time, selects a new contractor to perform this service.

In 1999, Northrop Grumman ("Northrop") was doing this work when the Army decided to award the contract to Respondent, which took over the duties on October 1, the start of the Army's fiscal year. Northrop employed 10 high voltage electrical linemen, but Respondent decided it could do the job with only 9. It hired their supervisor, Rex Moss, and told him to make recommendations concerning which linemen it should hire.

At that time, the alleged discriminatee, Anthony Jones, was working for Northrop as a high voltage lineman under Moss's supervision. Moss interviewed Jones, as well as the other linemen, but did not recommend that Respondent hire Jones. It did not.

During Jones' job interview, Moss referred to a job description for the high voltage lineman position. The job description provided, in part, that the lineman occasionally could be required "to work overtime and in inclement weather." When asked about this requirement, Jones indicated that he would go by the collective–bargaining agreement, rather than the job description.

The subject of required overtime had been a bone of contention between the Union and Northrop. Finally, Northrop and the Union had reached an agreement concerning when linemen would have to work overtime.

This agreement reduced both the number of overtime disputes and the stress level for all involved. However, the agreement did not signify that labor and management had reached a complete understanding. Even at the hearing in this case, several years after the overtime agreement went into effect, the Union and management disagreed about Respondent's authority to make overtime mandatory.

Therefore, when Jones asserted in the job interview that he would go by the collective–bargaining agreement rather than by what the job description said about overtime, those words did not endear him to Moss. As the first–line supervisor, Moss had found himself at the unpleasant center of the overtime dispute, where he had to deal both with the demands of higher management and the conflicting demands of many linemen.

After analyzing the testimony and other evidence, I concluded that when Jones indicated to Moss that he would follow the collective–bargaining agreement rather than the description

of required overtime in the job description, Jones was engaging in activity protected by the National Labor Relations Act. Further, I concluded that animus engendered by this protected activity had contributed to Moss's recommendation, which Respondent followed, not to hire Jones. Additionally, I concluded that Respondent fell short of demonstrating that it would not have hired Jones in any event, even in the absence of protected activity.

Scope of Remand

The Respondent's brief raises some matters which appear to lie outside the scope of the Board's remand order. Whether I can, or should, consider such issues depends on the Board's instructions to me when it remanded the case. Those specific instructions, in turn, must be understood in the context of the Board's general procedures in deciding cases alleging an unlawful refusal to hire, so it is helpful to begin with a brief summary of that framework.

As the Board stated in *FES (A Division of Thermo Power)*, 331 NLRB No. 20 (May 11, 2000), to establish a discriminatory refusal to hire, the General Counsel must first prove the following elements by a preponderance of the evidence:

1.That the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;

2.That the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and

3.That antiunion animus contributed to the decision not to hire the applicants.

Once the General Counsel has made this initial showing, the burden shifts to the Respondent to establish that it would not have hired the applicant even in the absence of the applicant's union activity or affiliation.

In its remand order, the Board directed me to "make additional credibility determinations and factual findings as are necessary to evaluate the Respondent's argument, as set forth in its brief, that it would have refused to hire Anthony Jones even in the absence of his protected conduct." Significantly, the Board's order did not instruct me to make any findings concerning the matters falling within the General Counsel's initial burden of proof, listed above.

Absent any direction to reexamine the evidence presented by the General Counsel to meet the government's burden, I must assume that the Board has not authorized me to revisit such issues. Rather, I conclude that I have jurisdiction only to consider whether the Respondent has rebutted the General Counsel's case by proving that it would not have hired Jones in any case, regardless of protected activities.

For two reasons, I will examine these issues briefly. First, even though a number of Respondent's arguments concern issues apparently outside the scope of the remand, a discussion of them brings into sharper focus the issues which the Board placed before me. Second, there remains the possibility that the Board intended its remand instructions to have greater breadth. In case the Board did intend for me to revisit issues pertaining to the General Counsel's case, the discussion below will provide such analysis.

Respondent's Arguments Outside the Scope of the Remand

Respondent raised a number of arguments in its brief. The subheadings below described the Respondent's arguments. My conclusions appear in the text.

I. RESPONDENT "WAS NOT HIRING"

In its brief, Respondent raises a number of challenges to the elements falling within the General Counsel's burden of proof. Even were I to consider these arguments, they are less than persuasive.

For example, Respondent argues that the General Counsel did not prove the first element, that Respondent was hiring, "in that the Employer undisputedly intended to hire only nine linemen, not ten." This argument does not rest comfortably with common experience. In many if not most instances, there will be more job applicants than jobs.

Additionally, the argument rests on an incorrect understanding of the General Counsel's burden. The General Counsel does not have to demonstrate that the employer intended to hire every applicant, only that it intended to hire someone. It would be strange to conclude that an employer seeking to fill 3 job openings "was not hiring" because it could not offer work to all 7 candidates who applied.

II. THE GENERAL COUNSEL DID NOT PROVE THAT JONES WAS "QUALIFIED"

Respondent's brief also argues that the General Counsel did not meet its burden of proving that Jones was qualified for the position he sought. As Respondent frames this argument, the issue falls outside the Board's remand. However, I believe the argument still warrants discussion for the following reasons:

1.The argument misconceives the way the Board allocated the burdens of proof in *FES (A Division of Thermo Power)*. Therefore, some discussion of the argument is needed for clarity.

2.Respondent's assertion that Jones did not meet it's job requirements leads to the issue of what requirements Respondent lawfully could impose. This issue must be resolved because it affects the ultimate question posed by the Board's remand, namely, whether Respondent would have refused to hire Jones even in the absence of his protected activities.

First, Respondent's misconception of the *FES* framework will be addressed. Respondent argues that the General Counsel bore the burden of proving that Jones was qualified and that the General Counsel did not meet this burden. Respondent's brief discusses this argument under a subheading captioned "The Board Did Not Meet Its Burden of Proving That Mr. Jones Was Qualified for the Position for Which He Was Applying." (In context, it is clear that when Respondent used the term "Board," it was referring to the General Counsel.)

Respondent's argument misapprehends the burden which rests on the General Counsel. Under the *FES* test, discussed above, the General Counsel does *not* bear the burden of proving that the job applicant was "qualified." Rather, under the second prong of the *FES* test, the General Counsel must prove that the "applicants had experience or training relevant to the an-

nounced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination " *FES*, 331 NLRB 9, 10 (2000).

On first reading, the Board's test may appear to impose upon the General Counsel the burden of demonstrating that an applicant was qualified to do the job, but the word "qualified" does not appear in the Board's formulation. A careful reading leads to the conclusion that the Board did not intend to require the government to prove an applicant qualified. Rather, the Board imposed on the General Counsel the burden of proving that the applicant met the *ostensible* requirements of the position, that is, the requirements which an employer held out either to the public in general (as in a help wanted advertisement) or to the job seekers when they applied.

Alternatively, the General Counsel may satisfy the second element of the *FES* test by proving that the employer did not follow the stated requirements or that these requirements were, in effect, a sham to conceal unlawful discrimination. Neither of these alternatives requires the government to prove an applicant "qualified." Therefore Respondent's argument rests on an incorrect assumption.

The Board does not sit as a creator and custodian of job qualifications in the way that the Académie Française exercises dominion over the French language. Rather, individual employers determine what qualifications a job requires. In doing so, they may be guided by local codes mandating, for example, that electricians be licensed, but neither the National Labor Relations Act nor the Board's Rules intrude upon an employer's discretion to establish the requirements for a particular job.

Moreover, in an unfair labor practice case, the Board does not set out to arbitrate what are the "true" qualifications for a given position. It only sifts below the surface of job requirements when necessary to find out if antiunion animus lurks underneath.

Under the Board's *FES* formulation, the General Counsel may prove the second element merely by showing a match between the announced requirements of the position and the applicant's training and qualifications. This showing requires *less* than proving that the applicant is "qualified" to do the job. Thus, in *FES*, supra, the Board continues as follows:

> If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity.

The argument in Respondent's brief apparently ignores this allocation of the burdens of proof. Therefore, it is not persuasive.

III. JONES DID NOT MEET THE ESTABLISHED JOB REQUIREMENTS

This assertion, that Jones lacked the necessary qualifications, does raise an issue within the scope of the Board's remand, because it sheds light on what Respondent would have done with Jones' application even in the absence of protected activities. The argument will be examined here, rather than later in this decision, because Respondent raised it in connection with Respondent's related argument, discussed above, that the General Counsel failed to establish that Jones was qualified for the position.

Respondent claims that Jones lacks two separate "qualifications" for the job. This deficit, Respondent argues, would disqualify Jones from employment in any event.

A. Jones Was Not Qualified Because He Was Not "The Best"

First, Respondent contends that higher management instructed Supervisor Moss to pick the "best" linemen without regard to seniority. Jones was not one of the "best" linemen, Respondent argues, and therefore he failed to meet this "only the best" qualification.

That argument appears rather circular, to say the least. It assumes the fact which Respondent bears the burden of proving, namely, that Jones was not among the "best."

Additionally, because 10 applicants applied for jobs, and Respondent hired 9 of them, asserting that Jones was not "the best" is tantamount to saying that he was the worst. Respondent bore the burden of proving either that Jones did not have the specific qualifications for the lineman position or that the other 9 applicants had superior qualifications. It cannot carry this burden simply by claiming that Jones was not the "best."

B. Jones Lacked Another "Qualification"—A Willingness To Work Overtime

Respondent asserts that it had established a second qualification for the lineman position and that Jones did not satisfy this requirement, either. According to Respondent, this "qualification" consisted of a willingness to work overtime as provided in the job description which Supervisor Moss read to the applicants. Thus, Respondent's brief states:

> Moss testified that he used the same format for interviewing all ten linemen for employment with Respondent. He used the job description *which incorporated the qualification that the applicant if hired must sometimes work overtime.*
>
> . . . .
>
> Both Mr. Bates and Mr. Moss state that during his interview Mr Jones said that he would not work overtime. It is undisputed that Mr. Moss viewed this to be an indication that Mr. Jones *did not meet one of the employment qualifications* for working for Respondent, Chugach.
> [Respondent's brief at pages 12, 13 (emphasis added).]

Respondent's argument—that one qualification for the lineman position consisted of a willingness to work overtime—appears reasonable standing alone, but it takes on a different character in the context of another fact, notably, that the linemen's bargaining representative had negotiated an agreement with management governing when these employees would work overtime. To the extent that the unilateral policy diverges from the bilateral agreement, requiring a job applicant to say yes to the unilateral policy also forces him to say no to the negotiated benefit.

Respondent argues that during the job interview, Jones flatly told Moss that he would not work overtime. To support his assertion, Respondent cites the testimony of a witness to the job interview, Ralph Bates:

> Not only did Bates corroborate Moss' recollection of Jones refusing to work overtime, Bates also recalled that the questions that Moss asked Jones were the same questions that Moss had asked him [Bates] when *he* was interviewed for employment with Respondent. He specifically recalled Moss reading to Jones (and to him (Bates)) the section of the job description dealing with, when required, being willing to work overtime. Bates recalled that Jones told Moss that he couldn't make him "work no overtime." [Tr. 930; 16–17]

Respondent's Brief at p. 12 (underlining in original).

Other parts of the record tell a different story. Bates was an onlooker during the job interview, but both participants in that interview—Moss and Jones—have stated that Jones made a considerably different statement. Instead of flatly refusing to work overtime, Jones told Moss that he would go by the collective–bargaining agreement.

Supervisor Moss took the witness stand twice during the hearing, and he also provided a pretrial affidavit to the Board agent investigating the unfair labor practice charge. Moss gave this statement on January 10, 2000, almost 6 months before the hearing began. The half year which elapsed between the affidavit and Moss's testimony at hearing provided time in which memories could fade. That time also allowed after–the–fact rationales to crystallize even if such reasons had played no part in the decision to reject Jones' employment application.

For these reasons, Moss's affidavit may provide a more accurate and revealing account than his testimony at trial. To the extent that his testimony conflicts with Moss's earlier affidavit, I credit the statements in the affidavit. In it, Moss described the job interview with Jones as follows:

> During the interview, I specifically asked Anthony [Jones] if he would be willing. . .to work overtime and in inclement weather. Anthony said NO. It meant nothing to him, that he would go by the Red Book. From those comments from Anthony I based the first comment of my interviewer comments.
>
> I continued to ask him questions and he would only say that it didn't matter to him, he would just go by the Red Book. No other employees referred to the Red Book. The basis of my second statement, that Anthony was very uncooperative and didn't want to answer any questions, was by his answering that he just wanted to go by the Red Book on a number of questions.

The "Red Book" is the collective–bargaining agreement between the Union and Northrop. When Jones described the job interview, he did not indicate that he told Moss that he would go by the "Red Book." Instead, Jones testified that he told Moss that he would go by the collective–bargaining agreement. However, the message communicated would be the same.

In his affidavit, Moss capitalized both letters of the word "no" in recounting that "Anthony said NO" to the question of whether he would work overtime. However, I do not conclude that Jones refused to work overtime in such a flat and absolute manner.

The next sentence in Moss's affidavit (after "Anthony said NO") contains a pronoun without an obvious antecedent: "It meant nothing to him, that he would go by the Red Book." The meaning of the sentence depends on the meaning of the word "it." That meaning is clarified by the history which Jones and Moss shared.

Both had worked for Northrop, Respondent's predecessor at the Redstone Arsenal. During that period, mandatory overtime had been a major point of contention between management and the Union representing the linemen. During this conflict, Supervisor Moss was, of course, aligned with management, and Jones was a vocal critic of Northrop's overtime policy.

After some unsuccessful attempts, the Union and management negotiated an agreement which established an overtime policy acceptable to both sides. This agreement replaced an overtime policy which a manager had issued unilaterally, and it relieved much of the tension.

During the job interview for employment with Respondent, Supervisor Moss did not pull out the negotiated agreement and ask Jones if he would be willing to work overtime in accordance with its terms. Rather, he referred to a job description which Respondent presumably prepared unilaterally.

It appears likely that Jones, a union supporter, would be suspicious of any management attempt to impose an overtime policy unilaterally, particularly considering the great effort it had taken the Union and management to reach a workable compromise on this issue. Asking a union supporter to pledge fealty to a document which apparently undermined the bargaining process evoked both suspicion and anger.

In this context, Jones' adamant reply that "it" meant nothing to him, that he would go by the "Red Book," takes on a clear meaning. "It" referred to the unilaterally—imposed overtime policy embodied in the job description. By asserting that the unilaterally—adopted policy meant nothing to him and that he would go by the "Red Book," Jones was decrying the perceived attempt to circumvent the bargaining relationship and undo the negotiated agreement.

Jones' protest, that he would adhere to the collective–bargaining agreement, hardly constituted a flat or absolute refusal to work overtime. Instead, it was only a refusal to work overtime in a manner inconsistent with the negotiated agreement. Moss, a veteran of the struggle to achieve such a negotiated overtime agreement, reasonably would understand Jones' meaning.

Therefore, I reject Respondent's argument that Jones was not qualified because he would not work overtime. Based on Jones' testimony and Moss's pretrial affidavit, both of which I credit, I find that Jones only refused to work overtime which would be inconsistent with the negotiated agreement.

The question remains, could Respondent lawfully require a job applicant to agree to work overtime in this manner. If Respondent had the right to set such a condition of employment, an applicant's refusal to agree to the condition could well be a legitimate justification for refusing to hire that applicant. This issue merits a thorough analysis, and will be addressed later in this decision.

IV. JONES DID NOT ENGAGE IN PROTECTED AND/OR CONCERTED ACTIVITY

Under the General Counsel's theory of this case, Jones engaged in protected activity when he told Supervisor Moss, during the job interview, that he would go by the collective–bargaining agreement rather than the overtime requirement in the unilaterally imposed job description. In essence, the General Counsel argues, Jones was asserting a right arising out of the collective–bargaining agreement and such an assertion constitutes protected activity under the doctrine articulated in *Interboro Contractors*, 157 NLRB 1295 (1966), and approved by the Supreme Court in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

In its brief, Respondent vigorously challenges the applicability of the *Interboro* doctrine to statements made by an applicant during a job interview. Jones had no reasonable basis to insist upon following the collective–bargaining agreement, Respondent argues, because Respondent was not then a party to the contract. Rather, the collective–bargaining agreement to which Jones referred bound the previous employer, Northrop. Not until later did Respondent adopt the agreement.

Before examining Respondent's argument, one point should be stressed. Although the General Counsel focused on Jones' statement during the job interview, the record clearly establishes that Jones engaged in other protected activity as well.

Supervisor Moss knew about this earlier protected activity at the time he conducted the job interview with Jones. In recommending that Jones not be hired, Moss characterized Jones as "very disruptive . . ." Moss explained in a pretrial affidavit that when he wrote that Jones was "disruptive," he was referring to an occasion when Jones and another employee "refused to work overtime [and] encouraged other employees to back them and their efforts and refuse to work overtime."

Jones and the other employee certainly were engaging in concerted activity when they refused to work overtime and when they encouraged other employees to support their position. Although Respondent disciplined Jones for the refusal, it later rescinded this discipline after the Union and management negotiated an agreement clarifying the overtime procedure.

The record does not establish that Jones and his fellow worker were engaging in a partial strike on this occasion when they refused to work overtime, and I conclude that their activities were protected as well as concerned. Moss's reference to these "disruptive" activities in his recommendation against hiring Jones clearly signifies that Jones' protected activity affected Moss's recommendation.

Jones' remark during the job interview—that he would go by the collective–bargaining agreement—must be viewed in the context of his earlier protected activity. It also should be considered in light of other information which Moss had received from some of Jones' fellow employees. In his affidavit, Moss recounted that after the union and management had entered into the overtime agreement—presumably ending an unpleasant situation—two employees reported to Moss that Jones was not satisfied:

> Anthony [Jones] kept picking on this mentioned agreement about overtime. He came to me and, he went to others and complained to the best of my recollection, after the agreement had been signed both Bobby and Ralph had come to me because Anthony had been telling them it needed to be changed (the agreement).

It had been difficult enough for the Union and management to achieve a workable agreement concerning overtime. After they ultimately succeeded, Moss accepted the resulting compromise and had little appetite for opening this controversial issue again. Now that the wound was healing, Moss could not have been happy to learn that Jones still wanted to pick at it.

During the job interview, when Moss heard Jones insist that he would follow the collective–bargaining agreement, not the job description, it almost certainly reminded Moss of Jones' previous protected activities. More than that, Jones' adamancy left little doubt that he would continue to be as assertive in the future as he had been in the past. Moss took notice and, in his negative recommendation, wrote not only that Jones was "disruptive" but also that he "tries to keep creating problem[s]. . . ."

Clearly, Moss's recommendation to reject Jones did not describe Jones' protected activities in the past tense. Rather, it stated that Jones *is* "very disruptive" and that he tries to *keep creating* problems.

Even if Jones' statement that he would "go by the contract" does not constitute protected activity under the *Interboro* doctrine, discussed below, it certainly refreshed Moss's recollection that Jones had engaged in protected activity in the past. Jones' words – and the conviction with which he spoke them – made Jones' past protected activity a matter of current concern.

For the reasons stated below, I conclude that the *Interboro* doctrine did protect Jones' statement during the job interview, but even if it did not, I would still find that Moss considered Jones' past protected activities in making the recommendation to reject him. Based on the wording of this recommendation, and the explanation of it which Moss gave in his pretrial affidavit, I conclude that the government has established a clear connection between Jones' past protected activities and Respondent's decision not to hire him.

Although I have concluded that the government need not rely on the *Interboro* doctrine to establish protected activity in this case, this doctrine merits further discussion because of Respondent's substantial arguments that it should not be applied here. The *Interboro* doctrine represents an exception to the general principle that two or more employees have to be involved in an activity for it to be deemed "concerted" and therefore protected by the Act. The *Interboro* exception flows logically from the concerted nature of the collective–bargaining process.

Section 7 of the Act expressly gives employees the right to engage in "concerted activities *for the purpose of collective bargaining* or other mutual aid or protection." 29 U.S.C. Section 157 (emphasis added). An employee's insistence that management follow the terms of the negotiated agreement benefits the entire bargaining unit, not merely the single employee who asserted the contractual right. In effect, such an assertion of a contractual right continues the activity which employees began in concert when they negotiated the contract, and it merits the protection of the Act. Obviously, the right to bargain collectively would mean little if an employee could be

disciplined or discharged for seeking the fruits of that collective bargain.

Nonetheless, Respondent argues that the *Interboro* doctrine does not apply to the present facts because at the time of his job interview, Jones only was asserting a right arising out of a contract between his Union and his current employer, Northrop, and not a right arising out of an agreement between the Union and Respondent. Although the Respondent does not cite specific authority to support this argument, its brief states as follows:

> The error in his Honor's holding lies in his disregard for the fact that the *Interboro* doctrine applies to situations in which an *employee* of an employer makes protestations concerning an *existing* collective bargaining agreement between the employer and the union, and to which the employee is a beneficiary. In this case Mr. Jones was not an *employee* of Respondent, and there was *no existing contract* between the union and the Respondent to which Mr. Jones was a beneficiary. In other words, Mr. Jones was not complaining about an existing collective bargaining agreement involving Respondent as was the case in *Interboro*. If the *Interboro* doctrine applied as his Honor found, all applicants for employment could refuse to agree to meet the qualifications of the hiring employer and instead state that they would only meet the qualifications prescribed in their former employer's union contract; then when the employer refused to hire the applicant, the applicant could claim protection under the Act for not being hired due to the fact that they had referenced *a* union contract. Needless to say, if that were the law, there would be millions of dissatisfied applicants making claims under the NLRA.
>
> [Respondent's brief at pages 14–15 (emphasis in original).]

Respondent's argument, quoted above, appears to mix together two separate concepts which should be considered separately. The first concerns whether Jones engaged in protected activity. The General Counsel bears the burden of proving this fact.

The second concept concerns when an applicant's refusal to work under proffered conditions of employment constitutes a legitimate business reason for refusing to hire him. Such an issue would arise only after the General Counsel has established the initial three elements of the *FES* test, forcing Respondent to shoulder the burden of proving that it would have taken the same action in any event, even in the absence of protected activity.

The two concepts get mixed together in Respondent's argument because when a job applicant insists on working under the terms of the previous employer's collective–bargaining agreement, that insistence also entails a refusal to work under the new conditions set by the hiring employer. If the *Interboro* doctrine protects the applicant's right to invoke the collective–bargaining agreement of another employer, Respondent contends, it necessarily empowers the applicant to do what a job applicant has never been able to do before, namely, dictate the working conditions offered by the hiring employer.

Respondent's argument would carry considerable force if the *Interboro* doctrine really allowed such a result. However, the doctrine carries built–in safeguards to prevent it from being abused in this manner. Under the *Interboro* doctrine, an employee's assertion of a collectively–bargained right will enjoy the Act's protection only if he "has a reasonable and honest belief that his contractual rights are being violated" and only if his action "is reasonably directed toward enforcement of a collectively bargained right." *Francis Building Corp.*, 327 NLRB 485 (1998).

When these safeguards are applied to the hypothetical situation described in Respondent's brief, the result is obvious. Should a stranger walk into a company's personnel office, apply for a job, and then insist that this job pay the same wage rate a previous employer had paid under a collective–bargaining agreement, the applicant may enjoy a good laugh but he will not enjoy the protection of the *Interboro* doctrine. Under these facts, he clearly would not have a reasonable and honest belief that his contractual rights were being violated. Similarly, his insistence on the former wage rate would not be reasonably directed to the enforcement of a collectively bargained right.

The *Interboro* safeguards are so stringent that one may wonder if the doctrine could ever apply during a job interview. When, if ever, would a person applying for a job with a new company have a reasonable expectation that his previous employer's collective bargaining agreement would apply?

At least one situation comes to mind. It involves an employer which takes over another employer's operations at a particular location. If the bargaining unit remains unchanged under the new employer, and if a majority of the employees in this bargaining unit had been employees of the previous employer in the same bargaining unit, then the new employer must recognize the union which represented those unit employees. Ordinarily, though, the new employer will not be obliged to continue in effect the previous terms and conditions of employment Rather, it may set the initial terms and conditions of employment unilaterally.

However, this general rule has an exception. In certain instances, the law requires the new employer to continue in effect the terms and conditions enjoyed by the bargaining unit employees in their previous employment. The Supreme Court explained when this exception arises:

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and it which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

NLRB v. Burns Security Services, 406 U.S. 272, 294–295 (1972). See also *Galloway School Lines*, 321 NLRB 1422 (1996); *Canteen Co.*, 317 NLRB 1052 (1995).

In the present case, Respondent took over the operations performed by Northrop at the Redstone Arsenal. Although Northrop employed 10 high voltage linemen in the bargaining unit, Respondent decided it only needed 9, but all of those 9 came from the Northrop bargaining unit.

These facts certainly would be consistent with a finding that Respondent, as a "perfectly clear" *Burns* successor, had a duty not only to recognize the Union but also to continue in effect

the terms and conditions of employment which the linemen enjoyed while working at Northrop. Indeed, Respondent did adopt the collective–bargaining agreement which the Union had entered into with Northrop, although Respondent took this action after it had decided which linemen to hire.

The complaint in this case does not allege that Respondent was a "perfectly clear" *Burns* successor to Northrop. In fact, it does not allege that Respondent was any kind of successor. Because the successorship issue was not fully litigated, I make no findings concerning Respondent's possible status as a successor to Northrop. However, it is not necessary to make such a successorship finding to determine whether or not the *Interboro* doctrine should protect the comment which Jones made during his job interview.

Whether or not the *Interboro* doctrine applies does not turn on Respondent's status as a successor. Rather, it depends on the employee's reasonableness and honesty in asserting a collectively–bargained right. Specifically, the *Interboro* safeguards limit this doctrine to instances in which the employee has a reasonable and honest belief that his contractual rights are being violated. Likewise, the *Interboro* doctrine only protects a statement which is reasonably directed to enforcing a collectively–bargained right.

In most job interviews, there would be no reason for an applicant to believe a previous employer's collective–bargaining agreement had any relevance to the new employer's ability to specify the terms of employment. In the present case, however, the total circumstances made it reasonable for Jones to believe that both the bargaining unit and the terms and conditions of employment would continue unchanged.

It should be stressed that the *Interboro* doctrine does not require that Jones be right, only that his belief is reasonable and honest. Thus, the Board has stated:

> the employee does not even have to be correct in his assertion that the collective–bargaining agreement has been violated for his activity to be protected. As long as the employee's complaint or action is based on a reasonable and honest belief that his contractual rights are being violated and is reasonably directed toward enforcement of a collectively bargained right, he is entitled to the protection of the Act.
> *[Francis Building Corp.*, 327 NLRB 485 (1998).]

Not only was Jones' belief honest and reasonable, it proved to be prophetic. As noted above, Respondent signed the same collective–bargaining agreement which Northrop had entered into with the Union.

Moreover, it was fully reasonable for Jones to raise the subject of the collective–bargaining agreement during the job interview and to insist that the negotiated terms be applied. When Supervisor Moss asked Jones to agree to the overtime terms in the job description, it forced the issue. Jones had to make a choice then and there, either to abandon the contractual right and agree to the Respondent's terms, or to invoke the negotiated agreement. His choice, speaking up, was reasonably directed to enforcement of the contractual right which would have been lost had he kept silent.

In sum, I conclude that the *Interboro* doctrine applied to this situation. Therefore, contrary to the argument in Respondent's brief, Jones' assertion that he would go by the collective–bargaining agreement constituted protected activity.

V. THE GENERAL COUNSEL DID NOT PROVE ANIMUS

Respondent advances a number of arguments to support its contention that the General Counsel failed to prove the element of animus. Noting that it hired union stewards, Respondent's brief asserts

> There is no record evidence indicating that those applicants, especially union stewards (who typically file *more* grievances than any other bargaining unit employee), would be less likely to assert their collective bargaining rights under a new contract that would be signed by Respondent than they had been with the predecessor, yet they were hired!

Respondent's brief then identifies two employees who had filed grievances during their employment with Northrop, but whom Respondent hired nonetheless.

Additionally, Respondent argues that Supervisor Moss, who recommended against hiring Jones, had done Jones a favor in 1999 when the lineman had to be absent from work for a surgical procedure. According to Respondent's brief, Moss helped Jones arrange his time off so that he still would be eligible for holiday pay.

Respondent also notes that other employees had made complaints about conditions of employment at Northrop but Respondent hired them nonetheless. Further, Respondent points to a statement in Jones' pretrial affidavit which indicated that Jones believed that Moss did not recommend that Respondent hire Jones because of an incident in which Moss hit Jones.

In thus disputing that the General Counsel established animus, Respondent is raising an issue outside the scope of the Board's remand. In sending the case back for further consideration, the Board did not direct me to reconsider whether or not the General Counsel met its burden of proof. In essence, the Board told me to examine whether Respondent had rebutted the General Counsel's case by showing that it would not have hired Jones even in the absence of protected activity. Because the Board did not instruct me to reconsider whether the government had established the requisite elements under *FES*, I will discuss Respondent's "lack of animus" arguments only briefly.

Respondent's argument that it hired others who had filed grievances, including union stewards, must be considered in light of the total circumstances. Respondent had decided it needed nine high voltage linemen and decided to hire them from Northrop's workforce at the Redstone Arsenal. Since Northrop employed only 10 high voltage linemen, Respondent necessarily would be hiring all but one of them.

In that circumstance, Respondent could not have rejected every single lineman who had filed a grievance. If it hired all but one of the predecessor's linemen, it certainly could not divide that applicant pool into one group of employees who had filed a grievance and another group of employees who had not.

Additionally, Respondent's argument assumes that the government must prove that Respondent reacted with similar hostility to every grievance, regardless of the subject matter. Yet the Board, drawing on its specialized expertise in the field of

labor relations, may note that from an employer's perspective, not every grievance will cause the same amount of grief. Some grievances concern rather unemotional matters, such as routine payroll errors, while other grievances press "hot buttons" by raising issues which have produced contention in the past.

The mandatory overtime issue fell into the latter category. It had caused considerable controversy, even anguish, before finally being put to rest by the 1997 memorandum of understanding. Moss reacted with animus, I concluded, not because he considered it likely that Jones would file *a* grievance (that is, "any old grievance"), but because he feared Jones would resurrect the mandatory overtime issue.

Moss was concerned not only that Jones might file a grievance, but that he would rally other employees to challenge the overtime policy. Such action, of course, also is protected by the Act.

Moss's worry that Jones would engage in such activity becomes clear from an examination of his written recommendation that Respondent not hire Jones and of his pretrial affidavit. In his recommendation that Jones be rejected for employment, Moss wrote that "Anthony is very disruptive and tries to keep creating problem[s] with myself and the other linemen." In his pretrial affidavit, Moss explained what he meant by this comment:

> In the interview results section, I commented that Anthony is very disruptive and tries to keep creating problems. This comment was not based on the interview, but just from working with him for the past 5–10 years. A number of employees talking to me about Anthony griping is what I was referring to. On one occasion, when Jeff Creel and Anthony refused to work overtime, they encouraged other employees to back them and their efforts and refuse to work overtime.

This statement leaves no doubt that Moss considered it "disruptive" when Jones and another employee refused to work overtime and "encouraged other employees to back them. . ." Such actions, however, lie at the heart of concerted activity for mutual aid or protection protected by Section 7 of the Act.

Because Moss referred to Jones' past "disruptive" activity in the recommendation not to hire him, I must conclude that Moss took such activity into account. This conclusion leads, in effect, to a simple and undeniable syllogism: Moss based his decision to reject Jones, at least in part, on Jones' past activities. Such activities were protected by law. Therefore, Jones' protected activities affected Moss's recommendation against employing him.

The term "animus" provides a convenient way to refer to unlawful motivation based on protected activities. However, in cases involving an employment decision based on mixed motives, it is more precise to say that the General Counsel bears the burden of proving a link or nexus between an employee's protected activity and the adverse employment action he suffered.

Moss's recommendation not to hire Jones, read together with Moss's explanation of that recommendation in his pretrial affidavit, clearly establishes such a nexus. Therefore, I must reject Respondent's argument that the General Counsel did not carry the government's burden of proof on this issue.

Respondent's brief further asserts that Moss only recommended that Respondent reject Jones' application, but that a higher official, Scillian, made the actual decision. Respondent argues that Moss's motivation cannot be imputed to Scillian.

For reasons discussed later in this decision, the evidence establishes that Moss actually made the employment decision and that Scillian merely "rubber stamped" it. Moreover, Scillian clearly made Moss an agent of Respondent by telling him, as recounted in Moss's affidavit, to interview the linemen and "to pick the best people I had." In carrying out this instruction, Moss clearly acted within the scope of his authority as an agent. His actions and motives in doing so may be imputed to the Respondent.

In challenging the evidence of unlawful motivation, Respondent's brief refers to a statement in Jones' pretrial affidavit indicating that Jones believed that Moss rejected him for employment because of an altercation which took place a number of years earlier, before Moss became a supervisor. As Jones explained this incident, Moss erroneously believed that Jones had called Moss an uncomplimentary name, and hit Jones.

Moss's own statements regarding his motivation, appearing in both the written recommendation not to hire Jones and in Moss's pretrial affidavit, constitute admissions which are more probative than Jones' speculation. Jones cannot read Moss's mind. Only Moss could do that. Therefore, I conclude that Moss acted for the reasons he stated in the documents he signed.

Additionally, if Moss had hit Jones without justification, as Jones asserted, that incident would just as likely instill in Moss a sense of guilt, rather than an urge to hurt Jones further. Such a sense of guilt would be consistent with another incident described in Respondent's brief, when Jones had to undergo surgery. At that time, Moss helped Jones preserve his holiday leave.

Whether or not guilt motivated this act of kindness by Moss, doing Jones such a favor when he was sick does not rule out the possibility that Moss would later recommend against hiring Jones because of Jones' protected activities. Helping Jones preserve his leave would not expose management to any unpleasant experience, but hiring Jones could result in more "disruptions" from Jones' protected activities. In other words, Moss had no reason not to help Jones with his holiday leave, but Moss did have a reason—albeit an unlawful one—to recommend against hiring him.

In sum, were I to revisit the issue of unlawful motivation, I would still conclude that the General Counsel had carried the government's burden of proof.

Respondent's Rebuttal Arguments

The arguments discussed above pertain primarily to issues within the General Counsel's burden of proof. Respondent raises several arguments in to support a conclusion that it would have refused to hire Jones in any event. These will be considered in the order they appear in Respondent's brief.

VI.HIGHER MANAGEMENT LACKED KNOWLEDGE

Respondent contends that although Supervisor Moss interviewed Jones, a higher management official, Billie H. Scillian, actually made the decision not to hire Jones. Respondent fur-

ther argues that Scillian did not know that during the job interview, Jones told Moss he would follow the provisions in the collective–bargaining agreement (the "red book") concerning overtime.

Because this actual decision–maker was unaware of Jones' comment, Respondent contends, antiunion animus did not enter into the decision not to hire Jones. "Even if the ["red book"] comment was protected," Respondent's brief asserts, "Moss' knowledge that Jones made such a comment cannot be imputed to Scillian."

In one sense, this argument does not appear to fall within the scope of the Board's remand. The General Counsel bore the burden of establishing that antiunion animus contributed to the decision not to hire Jones, and to prove this point, the government necessarily had to demonstrate that Respondent knew or believed that Jones had engaged in protected activity.

On the other hand, it might also be considered as a rebuttal argument. By proving that the person who made the decision to reject Jones did not know about Jones' protected activity, Respondent is also proving that Respondent would have made the same decision even in the absence of protected activity. Protected activity not known by management obviously would not affect management's decision.

To the extent that the argument may be considered a challenge to the finding that the General Counsel carried the government's initial burden, I must reject it as outside the scope of the remand. However, it will be considered in the rebuttal context.

At the outset, it should be stressed that Jones' comment during the job interview—that he would follow the collective–bargaining agreement—is not his only protected activity. As discussed above, he also engaged in concerted activities to protest the predecessor's overtime policy and to enlist other employees in that protest.

Moss clearly was aware of this earlier protected activity, because he described it in his pretrial affidavit. Presumably, Respondent would argue that the General Counsel has failed to establish that Moss informed Scillian about this protected activity as well. For two reasons, Respondent's argument is unavailing. As a matter of law, Supervisor Moss's knowledge clearly is imputable to Respondent. As a matter of fact, Moss made the actual decision to reject Jones, and Scillian merely rubber–stamped it.

Respondent does not dispute that it assigned to Moss the task of interviewing job applicants and recommending which Respondent should hire. Moss's superior, Scillian, gave him this assignment: "I asked him to identify the best people," Scillian testified, "and rank them."

The record clearly demonstrates that Moss made effective recommendations. In performing this hiring function, Moss acted as Respondent's supervisor and agent within the meaning of Section 2(11) and 2(13) of the Act. As the Board stated in *Dobbs International Services, Inc.*, 335 NLRB 972 (2001), "It is well–established that a supervisor's knowledge of union activities is imputed to the employer." See, e.g., *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983). In addition, an employer is bound by the acts and statements of its supervisors whether specifically authorized or not. See, e.g., *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987); *Holiday Inn–Glendale*, 277 NLRB 1254, 1261 (1985)."

Moreover, the record establishes and I find that essentially, Scillian "rubber stamped" Moss's hiring recommendations and effectuated them without independently investigating the qualifications of the high voltage linemen Moss had interviewed. The following exchange during Scillian's cross–examination illustrates his minimal involvement in the selection process:

> Q. Can you tell us which, if any, qualifications Mr. Moss said that Mr. Jones lacked?
>
> A. Oh, gads. No.

In these circumstances, it makes little difference whether Scillian knew about Jones' comment that he would follow the collective–bargaining agreement. As a practical matter, Respondent had given Moss full authority to act as its agent in determining which linemen to hire and which to reject. Respondent must take responsibility for the motive of its agent in carrying out this assignment.

VII. OTHER REASONS FOR REJECTING JONES

A. Asserted Safety Concerns

Respondent contends that even if Jones had made no reference to the "red book" (collective–bargaining agreement) during the job interview, Moss would not have recommended him for hire. In its brief, Respondent further argues as follows:

> Your Honor disregards reasons given by the Respondent, as corroborated by Jones' fellow union members, for not hiring Jones, which included the fact that Moss and other persons did not want to work with Jones because they believed him to be an unsafe worker. These fellow employees of Jones expressed their opinion that they did not want to work with Jones and most assuredly preferred not to perform any "hot work" involving high voltage lines.

Respondent's argument must be taken very seriously. High voltage linemen work in a very dangerous profession and they work in teams; one person's safety depends considerably on his partner's attentiveness to safety. If Respondent had indeed been concerned about Jones' dedication to safety, such concern would constitute a legitimate and substantial reason, unrelated to protected activity, for rejecting him. Therefore, the testimony of linemen who had worked with Jones should be examined carefully.

Lineman Steve Pearson, who had worked with Jones while both were employed by Northrop, testified that he had seen Jones work without using safety equipment. Pearson also said that for safety reasons, the linemen are supposed to work in teams but that Jones sometimes had gone out by himself to make a repair without waiting for his partner to arrive.

Another lineman, Jerry Butler, described an instance in which he experienced difficulty working well with Jones. According to Butler, he and another lineman were "in the air," that is, working in a bucket lift, and Jones was below, operating the truck. Jones was controlling a hoist to lift a switch weighing 400 to 500 pounds, but, Butler testified, did not respond well to the signals from the men in the bucket. "[W]e'd give him a

signal and he'd go the other way," Butler explained. "We couldn't communicate with him what we wanted, or he just was going to do what he wanted to do. I don't know."

Butler had not worked around high voltage with Butler, but Butler testified that he did not believe that Jones was qualified to work on energized wires. "I wouldn't work high voltage with him," Butler said, "unless my job was threatened."

Another lineman, Ralph Bates, testified "If I had my druthers . . .there's people down there that I'd rather work with as Anthony [Jones]." However, when asked if he had ever observed Jones working on "hot work" (energized lines) with other people, Bates answered, "I probably have, but I can't recall for sure."

Moreover, Bates had not worked with Jones on any "hot work" other than "hot stick work," which involves using an insulated pole to throw a circuit breaker or perform some other action. Such "hot stick work," Bates explained, was "not near as dangerous as gloves on" work closer to the energized line itself.

Citing this testimony, Respondent's brief argues that it rebuts the General Counsel's case. However, the testimony of these linemen must be considered in light of an admission in Supervisor Moss's pretrial affidavit. In this January 10, 2000 statement, Moss reported that although Anthony Jones preferred to work with certain other linemen, "There was not anyone who requested not to work with Anthony."

Based on Moss's affidavit, which I credit, I reject the Respondent's suggestion that Moss did not recommend Jones for hire because other employees refused to work with him. Indeed, the record does not establish that Moss paid much attention at all to safety issues when he recommended that Jones should not be hired.

As discussed above, because the General Counsel established the initial three elements set forth in the *FES* test, Respondent bears the burden of proving that it would have rejected Jones' for employment regardless of his protected activity. It should be stressed that in deciding whether a respondent has carried this burden, the Board examines what criteria the decisionmaker *actually used* at the time of the decision.

Should a respondent later come up with some other justification for rejecting the applicant, based on some factor not actually considered at the time of the decision, such an *ex post facto* rationale will not rebut the General Counsel's case, no matter how reasonable the new criterion may appear to be.

Stated another way, if a disqualifying condition discovered after the hiring decision has any relevance, it pertains to the appropriateness of a reinstatement remedy, not to the issue of liability. See generally *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995); *Opryland Hotel***,** 323 NLRB 723 (1997). Therefore, if the decision–maker testifies that he would not have selected an applicant because of a particular factor, but the evidence shows that he attached little weight to that factor at the time he made the choice, then his testimony does not satisfy Respondent's burden of showing that it would have made the same decision even in the absence of protected activity.

My analysis of the record leads to the conclusion that Moss was not concerned about Jones' safety practices at the time Moss interviewed him and recommended he not be hired. My reasoning begins with the assumption that when a supervisor conducts a job interview, the supervisor asks the applicant questions about matters the supervisor considers important. Conversely, the job interviewer generally does not ask questions about matters which are not relevant to the hiring decision.

When Moss interviewed Jones, he did not focus on whether or not Jones would be a safe worker. Instead, Moss asked Jones whether he would be willing to work overtime in accordance with the job description. Moss's questions during the interview strongly suggest that safety concerns played little or no role in his decision that Jones should be rejected.

By the same logic, I conclude that if Moss truly had been concerned that Jones was an unsafe worker, Moss would have mentioned that fact in his recommendation that Jones should not be hired. This recommendation says nothing about safety. It does not criticize Jones for any safety infraction or unsafe practice. It does not raise any of the safety concerns that Respondent sought to develop at hearing through the testimony of fellow linemen. Instead, it recommends against Jones because he is "very disruptive," a conclusion Moss reached because of Jones' early concerted activities.

The way Supervisor Moss conducted the job interview, and the way he wrote the recommendation against hiring Jones, strongly suggest that safety considerations played little or no part in that decision. Other evidence points to this same conclusion.

If Respondent had rejected Jones' application because he was unsafe, presumably Respondent would have mentioned this concern earlier, when a Board agent investigated the unfair labor practice charge. Significantly, Respondent's November 22, 1999 position letter to the Board agent did not assert a safety justification. This letter, signed by Program Manager Scillian, stated, in part:

> Based on the company's assessment of the ten High Voltage Electrician/Linemen interviewed for the nine Linemen spaces, Mr. Jones, the subject of referenced charge, exhibited a capability to perform the tasks and functions of his clarification that was significantly less than the other applicants.

It would have been easy for Respondent to include a reference to safety along with the words "High Voltage," and obviously, such a juxtaposition would carry considerable persuasive force. However, Respondent did not. I must conclude that a safety justification had not yet occurred to Respondent, and therefore was not present at the time it rejected Jones for employment. Therefore, Respondent has not carried its burden of establishing that it would not have hired Jones even if he had not engaged in protected activity.

B. Other Asserted Work Problems

In arguing that Jones would not have been hired in any event, Respondent's brief focuses on contentions that Jones did not follow good safety practices. As discussed above, the position statement which Respondent submitted during the investigation of the unfair labor practice charge did not raise a safety

issue, but it did claim that Jones' work was not as good as that of the other linemen.

Moss's affidavit did raise some questions about the quality of Jones' work. Thus, Moss stated "I had never had any problems with his work except for sometimes he was careless." Additionally, Moss's affidavit stated as follows:

> Based solely on work quality, my recommendation would have been the same that Anthony not have been retained, because Anthony would stand back, try not to do as much work as the other employees. One example of Anthony's work quality occurred about three years ago when we were installing a light post and he knowingly used the wrong sized nut because he did not have the correct size on his truck. This caused the whole crew to lose 3 or 4 hours worth of work. I did not discipline him at the time.

For several reasons, I conclude that Respondent has failed to establish that it would not have hired Jones because of the quality. For one thing, the fact that Moss, in his affidavit, did not give a more current or more serious example of problems with Jones' work suggests that he had to look hard to find any problem at all.

Moreover, even assuming that Respondent established that Jones' work was less than perfect, that fact alone does not carry the burden of proving that Respondent would not have hired him because of performance problems. Such a conclusion can be reached only by comparing any deficiencies in Jones' work with that of the linemen whom Respondent hired.

For example, Moss's affidavit points to an instance, about three years earlier, when Jones used the wrong sized nut. Such a peccadillo might cause Respondent to reject Jones' application if all the linemen it did hire had absolutely perfect records. On the other hand, if any of these other nine linemen had a more serious blemish on his record, then Jones' problem with the wrong–sized nut would not explain why Respondent hired the other lineman rather than Jones.

The record does indicate that at one point, Jones received discipline for making slurs concerning other workers. Even though these incidents were rather remote in time, they might indeed constitute a nondiscriminatory reason for rejecting Jones in favor of other job applicants.

However, to make such a determination, it is necessary to consider more than Jones' own conduct. His actions cannot be judged in isolation but only by comparison to the disciplinary records and prior conduct of the linemen who were hired.

Under the *FES* test, which applies to allegations of discriminatory refusal to hire, a respondent's rebuttal burden is analogous to that of a respondent defending against a discriminatory discharge allegation evaluated under the framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In both situations, a respondent has the burden to come forward with more than just general assertions that the alleged discriminatee didn't measure up. As the Board stated in *Lampi LLC*, 327 NLRB 222 (1998):

> To establish an affirmative defense under *Wright Line* to a discriminatory discharge allegation, an employer must do more than show that it had reasons that could warrant discharging the employee in question. It must show by a preponderance of the evidence that it would have done so even if the employee had not engaged in protected activities. In assessing whether the Respondent has established this defense regarding [the alleged discriminatee's] discharge, we do not rely on our views of what conduct should merit discharge. Rather we look to the Respondent's own documentation regarding [the alleged discriminatee's] conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline.

A preponderance of the evidence in this case fails to establish that Respondent would have failed to hire Jones in any event, regardless of his protected activity.

Credibility

In its brief, Respondent vigorously argues that Jones' testimony should not be credited. However, based upon my observations of the witnesses, I conclude that Jones made a sincere effort to tell the truth. At one point during his testimony, Jones went through his pretrial affidavit and identified portions which were incorrect. These discrepancies appear to have been inadvertent, and Jones' willingness to point them out is consistent with my impression that he made an earnest attempt to be accurate.

In this regard, Jones' account of his interview with Supervisor Moss does not differ markedly from Moss's version. According to Moss, Jones said that he would rely on the "Red Book." According to Jones, he said he would go by the collective–bargaining agreement. Since the "Red Book" is, in fact, the collective–bargaining agreement, this minor variation does not impugn the testimony of either witness.

Although I conclude that Jones' testimony is reliable, it should be emphasized that it is not necessary to rely on it to find a violation. The most telling evidence consisted of Supervisor Moss's pretrial affidavit and his written recommendation that Jones not be hired. Moss is Respondent's supervisor and agent, and statements in his pretrial affidavit constitute admissions binding on the Respondent. Based on those admissions, I find that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Anthony Jones, as alleged.

CONCLUSIONS OF LAW

1. The Respondent, Chugach Management Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Electrical Workers, Local Union No. 338, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act on about September 1, 1999 by failing and refusing to hire Anthony Jones for a position as high voltage lineman and thereafter unlawfully has continued to fail and refuse to hire Anthony Jones.

4. The unfair labor practice described in paragraph 3, above, is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it must be ordered to cease and desist and to take certain affirmative action, described below, designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix A.

I recommend that Respondent be ordered to offer Anthony Jones immediate and full instatement to the position it unlawfully denied him or, if that position no longer exists, to a substantially equivalent position. I further recommend that Respondent be ordered to make Anthony Jones whole, with interest, for all losses he suffered because of Respondent's unlawful refusal to hire him.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended

ORDER

The Respondent, Chugach Management Services, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing to hire any job applicant because of that applicant's assertion of a right under a collective–bargaining agreement, or to interfere with, restrain, or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Anthony Jones immediate and full instatement to the position unlawfully denied him or, if that position no longer exists, to a substantially equivalent position.

(b) Make Anthony Jones whole, with interest, for all losses he suffered because of Respondent's unlawful refusal to hire him.

(c) Preserve and, within 14 days of request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its place of business in Huntsville, Alabama, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT fail and refuse to hire job applicants because they indicate an intention to actively enforce a collective–bargaining agreement applicable to them, or because they engaged in concerted activity with other employees for the purpose of collective–bargaining or for their mutual aid and protection.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL promptly hire Anthony Jones to the high voltage electrical lineman position or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL pay backpay and back benefits to Anthony Jones to make him whole for wages and benefits lost because of our unlawful discrimination against him.

CHUGACH MANAGEMENT SERVICES, INC.